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# THE EUROPEAN COURT OF JUSTICE: WHAT ARE THE LIMITS OF ITS EXCLUSIVE JURISDICTION?

TOBIAS LOCK\*

## ABSTRACT

*The article explores the limits of the ECJ's exclusive jurisdiction by addressing two main issues: firstly, whether there are exceptions to that exclusivity, such as the application of the CILFIT case law or the exclusion of Community law from the dispute. Secondly, it asks whether other international courts must respect the ECJ's jurisdiction over a case. The article commences by briefly discussing the ECJ's exclusive jurisdiction as it was established in Opinion 1/91 and the Mox Plant-Case and draws conclusions from this case law. It then addresses the above-mentioned points and comes to the conclusion that there are generally no exceptions to the ECJ's exclusive jurisdiction and that the only option open to Member States is to exclude Community law from a dispute (and even that option is subject to limitations). Furthermore, after exploring several routes advanced in the academic discussion, the article comes to the conclusion that other courts must respect the ECJ's jurisdiction and as a consequence declare the case inadmissible.*

**Keywords:** ECJ; international courts; exclusive jurisdiction; CILFIT conditions; relationship between Community law and international law

## §1. INTRODUCTION

In recent years, the question of jurisdictional conflicts between international courts has attracted much scholarly attention.<sup>1</sup> This article will discuss the European Court of

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<sup>1</sup> See for instance: Treves, 'Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice', 31 *New York University Journal of International Law and Politics* (1999),

Justice's (ECJ) relationship with international courts, which appeared in the spotlight with the so-called *Mox Plant-Case*.<sup>2</sup> At the heart of this issue lies the question of the general relationship between the Community legal order and international law (or other legal orders, which originated in international law). In recent years the issue of the ECJ's relationship with international courts and decision-making bodies has been continuously on the agenda for European lawyers as is evidenced by the European Court of Human Rights' *Bosphorus* decision<sup>3</sup> and by the ECJ's recent ruling in the *Kadi* case.<sup>4</sup> These two cases and the *Mox Plant-Case* highlight the increasing number of potential conflicts between the ECJ and other international courts and bodies. This article will focus on the question of jurisdictional conflicts in the narrow sense. Such a conflict exists where the ECJ and another international court or tribunal (potentially) have jurisdiction over one and the same dispute, i.e. a dispute between the same parties, with the same facts and the same provisions of an international agreement as the legal basis for its resolution. In this respect, the jurisdiction of the ECJ is of interest for two reasons: first, the jurisdiction is an exclusive jurisdiction and second, the Community is party to many international agreements, all of which potentially fall within the jurisdiction of the ECJ in so far as disputes between Member States are concerned. Many of these international agreements, however, also provide for their own system for the settlement of disputes, be it by referring disputes to the International Court of Justice (ICJ), to arbitration, or even by founding a new international court. This means that both the ECJ and the court or tribunal, which is given jurisdiction by the agreement, may claim jurisdiction over a dispute between Member States of the Community. This shows that there is a potential for conflicts of jurisdiction between the ECJ and international courts, which can result in contradictory decisions over the same case. Such a scenario would be highly problematic in terms of legal certainty but also for the reliability of international and Community law in general. In this context, the ECJ's exclusive jurisdiction is particularly interesting as (at least from the point of view of European Community law) it excludes the other court's jurisdiction.

809; Thirlway, 'The Proliferation of International Judicial Organs and the Formation of International Law', in W. P. Heere (ed.), *International Law and The Hague's 750<sup>th</sup> Anniversary*, (Springer, 1999), 433; Spelliscy, 'The Proliferation of International Tribunals: A Chink in the Armor', 40 *Columbia Journal of Transnational Law* (2001), 143; Guillaume, 'The proliferation of international judicial bodies: The outlook for the international legal order' Speech to the Sixth Committee of the General Assembly of the United Nations of 27 October 2000 <[www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1](http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1)>, 8 November 2009; Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice', 31 *New York University Journal of International Law and Politics* (1999), 791; Y. Shany, *The Competing Jurisdictions Between International Courts and Tribunals* (OUP, 2004), 1–11.

<sup>2</sup> Case C-459/03 *Commission v Ireland* [2006] ECR I-4635.

<sup>3</sup> *Bosphorus v Ireland* (App no 45036/98) 2005 ECHR 2005-VI; more recently confirmed by *Coopérative des agriculteurs de mayenne v France* (App no 16931/04) (2006).

<sup>4</sup> Joined Cases 402/05 P and 415/05 P *Kadi and al Barakaat v Council* [2008] ECR I-6351.

While the conditions for the ECJ's jurisdiction over such agreements have been widely discussed, this article will ask and attempt to answer two further questions: first, whether there are exceptions to the ECJ's exclusive jurisdiction. And second, whether another international court or tribunal called upon to decide such a dispute would be forced to dismiss the case.

## §2. THE EXCLUSIVE JURISDICTION OF THE ECJ

### A. THE GENERAL SCHEME LAID DOWN IN THE TREATY

Articles 220 to 245 of the EC Treaty contain the main provisions dealing with the jurisdiction of the Court of Justice of the European Communities (ECJ). Article 292 EC indicates that this jurisdiction is exclusive. The provision provides that 'Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein'.<sup>5</sup> Accordingly, any Member State, which submits a dispute regarding Community law to any other court than the Community courts, violates the Treaty. The ECJ discussed the exclusivity of its jurisdiction for the first time in Opinion 1/91. In that opinion, the ECJ found the draft agreement on the European Economic Area to be incompatible with the EC Treaty because it provided for a Court to be established that was supposed to decide upon disputes between the 'contracting parties' to that agreement. Considering that a 'contracting party' could either mean the EC, a Member State or the EC and its Member States together, depending on the distribution of competences under the EC Treaty, the EEA Court would have had to decide who was competent according to Community law.<sup>6</sup> In other words, the EEA Court would have had to interpret the EC Treaty. The ECJ did not base its decision on Article 292 EC, however, but rather on Article 220 EC. Article 292 EC was not applicable in that scenario as the EEA Court was not competent to decide over disputes between the Community's Member States. Rather, the ECJ based its exclusive jurisdiction on its role in preserving the autonomy of the EC legal order according to Article 220 EC. This shows that the exclusive jurisdiction of the ECJ goes further than Article 292 EC suggests. Not only does it encompass disputes between EC Member States but also covers any interpretation of Community law, e.g. in a dispute between the Commission and a Member State. One may wonder why the drafters of the EC Treaty did not include an overall provision instead of Article 292 EC, which only

<sup>5</sup> A similarly phrased provision is contained in Art. 193 Euratom: 'Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.'

<sup>6</sup> Opinion 1/91 [1991] ECR I-6079, para. 34; this was confirmed by the Court in Opinion 1/00 [2002] ECR I-3493, para 15-17.

refers to the ECJ's exclusive jurisdiction over disputes between Member States.<sup>7</sup> An explanation might be that historically the main function of Article 292 EC seems to have been to prevent the Member States from submitting disputes to the International Court of Justice or to arbitration in order to ensure a consistent interpretation of Community law. In addition, when the EC Treaty was negotiated in the 1950's, only States had access to international adjudication and therefore the drafters did not anticipate disputes over Community law other than between the Member States. Therefore, Article 292 EC is a reflection of the ECJ's exclusive competence but does not contain every aspect of it.

Apart from ensuring a consistent interpretation of Community law, the exclusive jurisdiction of the ECJ means that the procedural particularities before the ECJ cannot be dispensed with. These particularities include the requirement that the European Commission give a reasoned opinion in proceedings according to Article 227 EC and the requirement for an opinion of the Advocate General.<sup>8</sup>

In terms of content, Article 292 EC endows the ECJ not only with an exclusive jurisdiction over the interpretation and application of the EC Treaty itself but also over secondary Community law, such as the interpretation of directives or regulations. When it comes to potential jurisdictional conflicts between the ECJ and another court or tribunal, the Community's agreements are of special interest as they will sometimes provide for their own dispute settlement mechanisms. According to the ECJ's consistent case law since *Haegeman*,<sup>9</sup> provisions in Community agreements can become an integral part of Community law. Where that is the case, the ECJ will claim that it is exclusively competent to interpret these agreements.<sup>10</sup> This means that in case of a dispute over the interpretation of such an agreement, Member States will have to ignore the means of dispute settlement provided for in that agreement and bring the dispute before the ECJ instead.

## B. DIFFERENT TYPES OF AGREEMENT

In order to identify the provisions of an agreement which are integral parts of Community law, it is necessary to distinguish between two different types of Community agreements: agreements concluded by the Community alone and mixed agreements, i.e. agreements concluded by both the Community and the Member States. There are two typical scenarios in which mixed agreements are concluded: They are either concluded because parts of the agreement do not fall within the Community's (exclusive or shared) competence over the subject matter but in the competence of the Member States. Or they

<sup>7</sup> Such disputes can be brought before the Court according to Article 227 EC, which happens very rarely.

<sup>8</sup> The Advocate General is generally required to make his submissions in all cases before the ECJ according to Articles 222(2) EC and 20(4) of the ECJ-Statute.

<sup>9</sup> Case 181/73, *Haegeman v Belgian State* [1974] ECR, 449, para 5.

<sup>10</sup> Case C-459/03, *Commission v Ireland* [2006] ECR I-4635.

are concluded because the Community has only got a shared competence, which it has not yet exercised, which means that the Member States still enjoy their competence over the field in question.<sup>11</sup> The need for the conclusion of a mixed agreement arises because only when the Community chooses to exercise a shared (or concurrent) competence do the Member States lose their competence to legislate in the field covered by that shared competence. The main reason for the conclusion of mixed agreements is the facilitation of the coexistence of the Community and the Member States in international relations.<sup>12</sup> Otherwise a potential party to an agreement with the Community would be forced to conclude an agreement with the Community as far as the Community's competence goes and conclude twenty-seven individual agreements with the Member States on issues concerning their competence. This would not only be cumbersome and lead potential partners to shy away from concluding an agreement with the Community but would also force the Community and the Member States to precisely delineate their competences, which they may often wish to avoid for political or practical reasons. All of these problems can be circumvented by concluding a mixed agreement.

Regarding agreements concluded by the Community alone, the *Haegeman* case law does not cause much difficulty. All provisions of these agreements must be regarded as part of Community law resulting in an exclusive competence of the ECJ to interpret them. With regard to mixed agreements, the ECJ has consistently held that they have the same status in the Community legal order as purely Community agreements.<sup>13</sup> Nonetheless, the situation becomes more complex. As mentioned above, mixed agreements can contain provisions that fall into the exclusive competence of the Community, provisions that fall into the competence of the Member States and provisions for which there is a shared competence.<sup>14</sup> In the *Haegeman* decision, the ECJ did not yet draw any such distinction even though the agreement at issue was a mixed agreement. That distinction was made in the later *Demirel* judgment where the ECJ expressly left unresolved the question whether those provisions of a mixed agreement that fall into the exclusive competence of the Member States are outside its jurisdiction.<sup>15</sup> That this is indeed the case has since been confirmed<sup>16</sup>, most recently in the well-known and much discussed *Mox Plant*-Case.<sup>17</sup>

<sup>11</sup> P. Eeckhout, *External Relations of the European Union*, (OUP, 2004), 190.

<sup>12</sup> P. Koutrakos, *EU External Relations Law*, (Hart, 2006), 150.

<sup>13</sup> Case C-13/00 *Commission v Ireland* [2002] ECR I-2943, para 14; Case C-459/03, *Commission v Ireland* [2006] ECR I-4635, para 84.

<sup>14</sup> At present, the division of competences is mainly based on the ECJ's case law. The Lisbon Treaty will contain express rules on the different types of EU competences in Articles 2–4 TFEU (general rules) and Article 216 TFEU (regarding international agreements).

<sup>15</sup> Case 12/86, *Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719 para 9; a detailed analysis of the ECJ's case law can be found in: Koutrakos, *EU International Relations Law*, 192–200.

<sup>16</sup> Case C-13/00, *Commission v Ireland* [2002] ECR I-2943 para 14; Case C-239/03, *Commission/France* [2004] ECR I-9325 para 25; cf. Vranes 'Gemischte Abkommen und die Zuständigkeit des EuGH – Grundfragen und neuere Entwicklungen in den Außenbeziehungen', *Europarecht* (2009), 44 (59).

<sup>17</sup> Case C-459/03, *Commission v Ireland* [2006] ECR I-4635, para 84; cf. case notes by: Romano, 101 *American Journal of International Law* (2007), 171; Lavranos, 'Mox Plant Dispute', 2 *European Constitutional*

At the heart of this dispute lay the interpretation of the United Nations Convention on the Law of the Sea (UNCLOS), which had been concluded as a mixed agreement.<sup>18</sup> The UNCLOS was adopted in 1982 to create 'a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment'.<sup>19</sup>

Ireland sued the United Kingdom for breaches of various environmental provisions of the UNCLOS<sup>20</sup> with regard to the authorization of a Mox plant<sup>21</sup> at Sellafield, alleging failures of the United Kingdom to assess the potential effects of the plant on the marine environment of the Irish Sea, to cooperate and to take all necessary steps to protect the marine environment of the Irish Sea. The UNCLOS contains its own system for dispute settlement laid down in Articles 279 to 299. With regard to jurisdiction, Article 287 UNCLOS gives the parties a choice of whether they want to refer the dispute to the International Court of Justice, the International Tribunal for the Law of the Sea (ITLOS) or to arbitration. Where the parties cannot agree on a procedure for the settlement of their dispute, that dispute can only be submitted to arbitration in accordance with Annex VII of UNCLOS.<sup>22</sup> As Ireland and the United Kingdom could not agree on a procedure for the settlement of their dispute, the case had to be submitted to an Annex VII arbitral tribunal. Ireland also applied for a preliminary ruling, for which the ITLOS was competent as the arbitral tribunal had not yet been set up.<sup>23</sup> The ITLOS assumed its own jurisdiction on the basis that it considered the Annex VII arbitral tribunal to have *prima facie* jurisdiction over the case according to Article 290(5) UNCLOS.<sup>24</sup> The question of the Annex VII arbitral tribunal's jurisdiction was problematic as in its pleadings before that tribunal, Ireland referred to several provisions of Community law. In addition, the ECJ had potential jurisdiction over the UNCLOS as it is a mixed Community agreement. Therefore, the European Commission instigated proceedings against Ireland under Article 226 EC, arguing that Ireland had violated the EC Treaty

Law Review (2006), 456; Cardwell; French, 'Who decides? The ECJ's judgment on jurisdiction in the MOX Plant dispute', 19 *Journal of Environmental Law* (2007), 121; Oen, 'Streitschlichtung zwischen EG-Mitgliedstaaten im Rahmen gemischter Verträge', 45 *Archiv des Völkerrechts* (2007), 136; Lavranos, 'Protecting its exclusive jurisdiction: the Mox Plant judgment of the ECJ', 5 *Law and Practice of International Courts and Tribunals* (2006), 479; Wegener, 'Familienstreitigkeiten nicht nach außen tragen?', *Zeitschrift für Umweltrecht* (2006), 582; Lavranos, 'The Mox Plant judgment of the ECJ: How exclusive is the jurisdiction of the ECJ?', *European Environmental Law Review* (2006), 291.

<sup>18</sup> United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

<sup>19</sup> Preamble to UNCLOS, para 4.

<sup>20</sup> Article 123, 192, 193, 194, 206, 207, 211 and 213 UNCLOS.

<sup>21</sup> A mixed oxide (which is a type of nuclear fuel) plant.

<sup>22</sup> Article 287(4) UNCLOS.

<sup>23</sup> Article 290(5) UNCLOS.

<sup>24</sup> ITLOS, Order of 3 December 2001; [www.itlos.org](http://www.itlos.org) [29 June 2009].

by not submitting the dispute to the ECJ. In response, the Annex VII Arbitral Tribunal suspended the proceedings in order to allow the ECJ to decide.<sup>25</sup>

The ECJ held that Ireland had in fact breached its obligations under the EC Treaty by submitting a dispute regarding provisions of the UNCLOS to a forum other than the ECJ. The UNCLOS was concluded on the basis of the Community's shared competence in the field of environmental protection laid down in Articles 174 to 176 EC.<sup>26</sup> Therefore the question was whether those parts of the agreement on which Ireland had based its claims fell into the Community's competence, i.e. whether the Community had elected to exercise its external competence.<sup>27</sup> Having discussed the various provisions on which Ireland had based its case before the Annex VII arbitral tribunal, the Court came to the conclusion that the Community had exercised its competence regarding the provisions in question. Therefore these provisions had to be regarded as an integral part of Community law, for the interpretation of which the ECJ had an exclusive jurisdiction. At the same time the Court held that provisions of a Community agreement dealing with the settlement of disputes do not become an integral part of Community law in a manner that such provisions create a new form of dispute settlement under the EC Treaty<sup>28</sup> because an agreement concluded by the Community cannot affect the allocation of competences within the Community.<sup>29</sup> This would amount to an amendment of the EC Treaty, which would have to follow the procedure laid down in Article 48 TEU. This result reflects the hierarchy of norms within the Community, with the EC Treaty at the top of that hierarchy, followed by Community agreements.

A consequence of this case law is that the ECJ has an exclusive competence to decide whether a provision of a mixed agreement falls within the exclusive competence of the Member States or whether there is a shared or Community competence. This means that only the ECJ has the power to decide upon its own jurisdiction. It follows that Member States will always have to consult the ECJ first that when considering to bring a dispute regarding the interpretation of a mixed agreement before an international court or tribunal.<sup>30</sup> This was expressly pointed out by the ECJ in the *Mox Plant*-Case.<sup>31</sup>

<sup>25</sup> Order No. 3, 24 June 2003; [www.pca-cpa.org/upload/files/MOX%20Order%20no3.pdf](http://www.pca-cpa.org/upload/files/MOX%20Order%20no3.pdf) [21 April 2009]; proceedings were finally terminated by Order No. 6, 6 June 2008; [www.pca-cpa.org/upload/files/MOX%20Plant%20Order%20No.%206.pdf](http://www.pca-cpa.org/upload/files/MOX%20Plant%20Order%20No.%206.pdf) [21 April 2009].

<sup>26</sup> Case C-459/03, *Commission v Ireland* [2006] ECR I-4635, paras 83 and 90–92.

<sup>27</sup> Case C-459/03, *Commission v Ireland* [2006] ECR I-4635, para 96.

<sup>28</sup> This was argued by Ireland in the *Mox Plant* Case, Case C-459/03, *Commission v Ireland* [2006] ECR I-4635, para 130.

<sup>29</sup> Case C-459/03, *Commission v Ireland* [2006] ECR I-4635, paras. 123, 132; Opinion of Advocate General Maduro (18 January 2006), para. 41; Wegener, *Zeitschrift für Umweltrecht* (2006), 583.

<sup>30</sup> Lavranos, 5 *Law and Practice of International Courts and Tribunals* (2006), 479, 487; Lavranos, 'Mox Plant Dispute' 2 *European Constitutional Law Review* (2006), 465.

<sup>31</sup> Case C-459/03, *Commission v Ireland* [2006] ECR I-4635, para. 135.



Whether the ECJ's exclusive jurisdiction is also triggered where the predominant part of the dispute falls outside the competence of the Community, was not expressly addressed by the ECJ. It seems, however, that the ECJ would want to decide the dispute even in such cases as there is no threshold for the ECJ's exclusive jurisdiction.<sup>32</sup> For one, the wording of Article 292 EC does not suggest anything of that kind even though, as Oen submits, it is open and thus susceptible to a contrary interpretation.<sup>33</sup> In addition, this approach would be in line with the ECJ's rigid stance on jurisdiction: Community law must be interpreted by the ECJ. Only the ECJ can validly determine the exact extent of the Community's external competence.

### C. DECLARATIONS ON THE DIVISION OF COMPETENCES

Is this, however, also the case where the Community has made a declaration delineating the Community's and the Member States' respective competences? Such a declaration had been made under Article 5 (1) of Annex IX to the UNCLOS and was at issue in the *Mox Plant-Case*.<sup>34</sup> That declaration stated that the Community had certain exclusive competences (e.g. for fishing resources) and that it also shared competences with its Member States. The question here is whether two Member States could bring a dispute to an international court or tribunal arguing that Article 292 EC was not violated because the declaration stated that the issues brought before the international court or tribunal fall entirely within the competence of the Member States. At the outset, it should be noted that the declaration is a declaration made under international law and not an act of Community law. One could therefore contend that the international court or tribunal would only have to interpret the declaration and not Community law. Therefore, Article 292 EC would not be affected. However, it would be wrong to conclude that Community law would be not at all affected by such an interpretation as the declaration usually reflects the legal situation under Community law. When interpreting such a declaration a court or tribunal would almost certainly come across ambiguities or openly worded passages. The court or tribunal would then resort to Community law as an aid for interpretation. This is set out in Article 31 (3) (c) of the 1969 Vienna Convention on the Law of Treaties (VCLT), which states that when interpreting a treaty the interpreter must take into account 'any relevant rules of international law applicable in the relations between the parties'.<sup>35</sup> As the EC Treaty would constitute such a rule, the international court or tribunal faced with the interpretation of such a declaration would have to

<sup>32</sup> This was pointed out by Maduro AG in Case C-459/03, *Commission v Ireland* [2006] ECR I-4635, para 14.

<sup>33</sup> Oen, 45 *Archiv des Völkerrechts* (2007), 145.

<sup>34</sup> [www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#European%20Community%20Upon%20signature](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#European%20Community%20Upon%20signature).

<sup>35</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

interpret the declaration in the light of the EC Treaty, which cannot be attained without first interpreting the EC Treaty itself. Admittedly, a declaration on the distribution of competences is not a treaty but a unilateral act. The rule contained in Article 31(3)(c) VCLT can, however, be applied *mutatis mutandis*.<sup>36</sup>

In the *Mox Plant*-Case, the declaration made under Annex IX of the UNCLOS even went so far as to explicitly invite its interpreters to refer to Community law stating that 'the Community has exclusive competence only to the extent that such provisions of the Convention or legal instruments adopted in implementation thereof affect common rules established by the Community'.<sup>37</sup> The question of when common rules are affected can only be resolved by interpreting the Community rules referred to. Therefore, in such a case Member States asking another court or tribunal to interpret that declaration implicitly ask it to interpret Community law. This would clearly constitute an infringement of Article 292 EC.

#### D. PRELIMINARY CONCLUSION

It follows from the foregoing that from the ECJ's point of view, its exclusive jurisdiction is all-encompassing and guarantees that the ECJ has the final say in the matter. This of course restricts the Member States in their choice of forum. Should the interpretation of a Community agreement be relevant for the resolution of a dispute between two Member States, they are thus forced to proceed in two stages. First, they will have to submit the dispute to the ECJ under Article 227 EC. The ECJ will then have to decide whether it has jurisdiction to hear the case, i.e. whether the provisions relevant for the case are an integral part of Community law. Only if the Court's answer is negative, can the Member States bring the case to another international court or tribunal. If the ECJ only assumes jurisdiction over a part of the dispute, Member States can choose to split up the case and bring the remainder, which does not concern Community law, before an international court or tribunal. Alternatively, they can have the whole case decided by the ECJ by way of an agreement under Article 239 EC. That provision gives the ECJ jurisdiction over disputes related to the subject matter of the EC Treaty if the dispute is submitted under a special agreement between the parties. Considering that a part of the dispute is governed by provisions of an agreement which are integral parts of Community law the necessary relationship with the subject matter of the Treaty should not be in doubt. This procedure appears to be relatively cumbersome and time-consuming.<sup>38</sup> As Member States may

<sup>36</sup> Cf. the draft articles on the interpretation of unilateral acts proposed by the Special Rapporteur Cedeño, appointed by the International Law Commission, ILC Report 2001 (Doc. No. A/56/10), footnote 1156.

<sup>37</sup> Declaration made pursuant to Article 5(1) of Annex IX to the Convention and to Article 4(4) of the Agreement, at No. 2, 2nd bullet point; [www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#European%20Community%20Upon%20signature](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#European%20Community%20Upon%20signature) [30 June 2009].

<sup>38</sup> This is one of the reasons why Oen, 45 Archiv des Völkerrechts (2007), 145, argues that the ECJ should not enjoy jurisdiction in such cases. Otherwise Member States could be deterred from resolving the dispute in the first place.

have an interest in a quick resolution of their dispute and may thus want to bring the case before an arbitral tribunal, which would also give them the benefit of deciding upon the composition of the bench and the rules of procedure, the ECJ's approach might lead Member States to avoid resorting to a judicial dispute resolution at all. Therefore, it is worth exploring whether there are exceptions to this rule.

### §3. POSSIBLE EXCEPTIONS

#### A. THE CILFIT-CONDITIONS

One possible exception to the ECJ's exclusive jurisdiction over a dispute would be the application of the conditions laid down by the ECJ in the CILFIT case regarding Article 234 EC. Article 234(3) EC provides that national courts of last instance have a duty to make a reference for a preliminary ruling to the ECJ if they are facing a question regarding the interpretation of the EC Treaty. In its famous CILFIT decision, the ECJ postulated three exceptions to that duty: firstly, where the question is not relevant and can thus not affect the outcome of the case;<sup>39</sup> secondly, where the question raised is materially identical with a question already decided by the ECJ (so-called *acte éclairé*);<sup>40</sup> and thirdly, where the correct application of Community law is so obvious that there is no room for reasonable doubt (so-called *acte clair*).<sup>41</sup> In fact, an arbitral tribunal created by Belgium and the Netherlands in a conflict regarding an ancient railway track called the Iron Rhine, applied the above-mentioned conditions when determining its own jurisdiction.<sup>42</sup> The Iron Rhine was a railway connecting Belgium and Germany through the Netherlands. In the 1839 Treaty of Separation between Belgium and the Netherlands, Belgium was granted a right to build a communication link to Germany through Dutch territory. In a later treaty of 1873 this right was modified and replaced by the right to build a railway, which was completed in 1879 and in use until 1991.<sup>43</sup> In the wake of discussions between the two countries about reactivating the railway, several issues could not be resolved. Therefore the parties submitted three questions to an arbitral tribunal which was formed under the auspices of the Permanent Court of Arbitration.<sup>44</sup> The main issue was that the Netherlands had declared parts of the route a nature reserve and thus

<sup>39</sup> Case 283/81, *CILFIT v Ministry of Health* [1982] ECR 3415, para. 10; as the ECJ rightly pointed out, this follows from the relationship between paragraphs 2 and 3 of Article 234.

<sup>40</sup> *Ibid* para 13.

<sup>41</sup> *Ibid* para 16.

<sup>42</sup> (Corrected) Award of the Arbitral Tribunal regarding the Iron Rhine Railway, Belgium v Netherlands, 25 May 2005, [www.pca-cpa.org/upload/files/BE-NL%20Award%20corrected%20200905.pdf](http://www.pca-cpa.org/upload/files/BE-NL%20Award%20corrected%20200905.pdf) [22 May 2009].

<sup>43</sup> (Corrected) Award of the Arbitral Tribunal regarding the Iron Rhine Railway, Belgium v Netherlands, 25 May 2005, [www.pca-cpa.org/upload/files/BE-NL%20Award%20corrected%20200905.pdf](http://www.pca-cpa.org/upload/files/BE-NL%20Award%20corrected%20200905.pdf) [22 May 2009], para. 16 et seq.

<sup>44</sup> *Ibid* para 26.

claimed that Belgium would have to comply with Dutch environmental law and bear the extra costs involved. In order to avoid a violation of Article 292 EC, the parties agreed that the arbitral tribunal should render its decision 'on the basis of international law, including European law if necessary, while taking into account the Parties' obligations under Article 292 of the EC Treaty'.<sup>45</sup> Considering that the Iron Rhine railway had been earmarked as a priority project within the system of trans-European networks under Articles 154–156 EC and that the Dutch environmental legislation provided for parts of the route to constitute a 'special area of conservation' within the meaning of the EC Habitats Directive,<sup>46</sup> Article 292 EC was potentially triggered. Therefore, the arbitral tribunal entered into a lengthy discussion why Article 292 EC was not applicable in the present case. The Tribunal argued that it was in a position analogous to that of a domestic court within the EC and thus the exceptions to the duty to make a preliminary reference according to Article 234 (3) EC were applicable.<sup>47</sup> Therefore, the Tribunal had to discuss whether it could decide the case without interpreting rules of EC law, which neither constituted *actes claires* nor *actes éclairés*.<sup>48</sup> After a lengthy discussion, the Tribunal arrived at the conclusion that EC law was not necessary for its decision. Therefore it viewed itself as competent to decide the dispute.

This line of argument, however, is not persuasive. The crucial question is, whether an arbitral tribunal formed under public international law is really in a position analogous to that of a domestic court when it comes to the interpretation of EC law. In order to make an argument of analogy, two requirements must be fulfilled: firstly, there has to be a lacuna in the law and, secondly, there must be a relevant similarity between the original rule and the case at hand.<sup>49</sup>

Addressing the first question, whether it constitutes a lacuna in the EC Treaty that the rules for the relationship between national courts and the ECJ are not the same as those for the relationship between international courts and the ECJ, there are good reasons to doubt that the tribunal reached the correct conclusion. Only if it could be established that the drafters of the EC Treaty did not intend that international tribunals should be treated in a different manner to domestic courts, could an analogy be made.<sup>50</sup> In order to answer this question, two points will be considered. Firstly, Article 234 only establishes a

<sup>45</sup> See arbitration agreement of 22 July 2003, [www.pca-cpa.org/upload/files/BE-NL%20Arbitration%20Agreement.pdf](http://www.pca-cpa.org/upload/files/BE-NL%20Arbitration%20Agreement.pdf) [5 June 2009].

<sup>46</sup> Council Directive No. 92/3/EEC of 21 May 1992 (OJ 1992, L 206 p. 7).

<sup>47</sup> (Corrected) Award of the Arbitral Tribunal regarding the Iron Rhine Railway, Belgium v Netherlands, 25 May 2005, [www.pca-cpa.org/upload/files/BE-NL%20Award%20corrected%20200905.pdf](http://www.pca-cpa.org/upload/files/BE-NL%20Award%20corrected%20200905.pdf) [22 May 2009], para. 103.

<sup>48</sup> Ibid.

<sup>49</sup> See Langenbucher, 'Argument By Analogy in European Law', 57 *Cambridge Law Journal* (1998), 481; K. Larenz; C.-W. Canaris, *Methodenlehre der Rechtswissenschaft*, (3rd ed., Springer, 1995), 202. This approach was endorsed by the ECJ, Case 67/78, *Union française de Céréales v Hauptzollamt Hamburg-Jonas* [1978] E.C.R. 1675; for further examples from the ECJ's case law see Langenbucher, *Cambridge Law Journal*, footnote 117.

<sup>50</sup> Langenbucher, *Cambridge Law Journal*, 483.

reference by domestic courts and not international courts. In contrast to that, the wording of Article 292 EC does not suggest that there is any such possibility for international courts. This shows that international courts cannot make a preliminary reference to the ECJ. Where that is not possible, it cannot constitute a lacuna in the law that the exception to making a reference is only explicitly contained in the Treaty with regard to domestic courts and not with regard to international courts as the latter do not have the right to make a reference in the first place. Secondly, it is clear from the wording of Article 234 EC that the drafters of the Treaty envisaged exceptions to a domestic court's duty to make a reference under Article 234(3) EC as the provision contains an explicit exception for cases where a decision on the question is not necessary to give judgment. This exception is contained in Article 234(2) EC to which Article 234(3) EC refers.<sup>51</sup> Considering that the drafters apparently envisaged exceptions to Article 234 EC and did not include any exceptions into Article 292 EC, there is little to suggest that they merely overlooked the possibility of exceptions to Article 292 EC. Rather it seems that they deliberately opted for a clear-cut approach as regards Article 292 EC. This speaks against the existence of a lacuna. This result is also in line with the object and purpose of Article 292 EC, which is to ensure a uniform and consistent interpretation of Community law.

In addition, it is doubtful whether the second condition for the existence of an analogy, the existence of a relevant similarity between the two rules at hand, is fulfilled. There is a marked difference between domestic courts and international courts when it comes to the interpretation of Community law. In principle, domestic courts have a right to interpret Community law whereas Article 292 EC bans international courts from interpreting it. The right of domestic courts to interpret Community law is reflected in Article 234(2) EC, which gives them a right to make preliminary reference to the ECJ but does not oblige them to do so. A duty to make such a reference lies only with courts against whose decisions there is no judicial remedy. This means that domestic courts, which are not courts of last instance, may generally interpret any provision of Community law. In the wider sense, they are thus part of the Community legal system. In contrast to that, international courts and tribunals stand outside the Community legal system. Their relationship with Community law is thus similar to that of a privately established arbitral tribunal, which has also been formed outside the Community legal order. Such a private arbitral tribunal has no right to make a preliminary reference according to the ECJ.<sup>52</sup> It is thus not in a position analogous to that of a domestic court even though it presides over domestic disputes. Therefore *a fortiori*, an arbitral tribunal formed under international law to decide an international dispute cannot be in an analogous position either. Moreover, as Lavranos has correctly pointed out, the Tribunal failed to understand the consequence of the CILFIT-jurisprudence. Contrary to what the Tribunal suggests, the consequence is merely that a domestic court is released from its obligation to make

<sup>51</sup> Case 283/81, *CILFIT v Ministry of Health* [1982] ECR 3415, para. 10.

<sup>52</sup> Case 102/81, *Nordsee v Mond* [1982] ECR 1095, para 10 et seq.

a reference but not from actually applying Community law.<sup>53</sup> The Iron Rhine Tribunal, however, chose to completely disregard Community law.

In conclusion, an international court or tribunal facing the interpretation of Community law is not in a position similar to that of a domestic court. An analogy to Article 234 EC and the exceptions to it can therefore not be made. Thus an international court or tribunal confronted with a question of Community law must declare the case before it inadmissible.

The Arbitral Tribunal's decision warrants one additional remark as its argumentation regarding the Habitat Directive is not convincing. The Tribunal argued that it did not have to interpret that Directive in order to render its award as its decision would be the same if it were based on Dutch environmental law alone.<sup>54</sup> This shows that the Tribunal misunderstood the relevance of Community directives for the interpretation of domestic law. National courts are obliged to interpret their national law in the light of the wording and purpose of directives even if the national legislation was not explicitly introduced in order to implement the directive into domestic law.<sup>55</sup> Therefore, the Tribunal's argument that it was able to decide the case on the basis of international and Dutch domestic law only, could not be correct as Dutch domestic law would have had to be interpreted in the light of the EC Habitats Directive. Moreover, the Tribunal spent fifteen pages of its award on actually interpreting Community law in order to determine whether it was relevant for the case before it. This alone should suffice to prove the relevance of Community law to the dispute.<sup>56</sup>

## B. EXCLUDING COMMUNITY LAW FROM THE DISPUTE

As was shown, an international court cannot rely on the exceptions to the duty of domestic courts of last instance under Article 234(3) EC in order to avoid a violation of Article 292 EC. However, it is conceivable that two Member States in a dispute before an international court or tribunal explicitly exclude the application of Community law by that tribunal in order to avoid a violation of the EC Treaty. The arbitration agreement between the Netherlands and Belgium in the Iron Rhine case could have been interpreted to mean that the parties wanted to exclude any interpretation of Community law by the

<sup>53</sup> Lavranos, 'The Mox Plant and Ijzeren Rijn Disputes: Which Court Is the Supreme Arbiter?' 19 *Leiden Journal of International Law* (2006), 223 (239); Lavranos, 'Concurrence of Jurisdiction between the ECJ and other International Courts and Tribunals' 14 *European Environmental Law Review* (2005), 223 (238).

<sup>54</sup> (Corrected) Award of the Arbitral Tribunal regarding the Iron Rhine Railway, Belgium v Netherlands, 25 May 2005, [www.pca-cpa.org/upload/files/BE-NL%20Award%20corrected%20200905.pdf](http://www.pca-cpa.org/upload/files/BE-NL%20Award%20corrected%20200905.pdf) [22 May 2009], para. 137.

<sup>55</sup> Case 14/84, *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para 26.

<sup>56</sup> Lavranos, 19 *Leiden Journal of International Law* (2006), 238; Cardwell; French, 19 *Journal of Environmental Law* (2007), 128.

arbitral tribunal from its jurisdiction. The arbitral tribunal did not interpret it as such but in effect went down a similar route in that it did not apply Community law.

The restriction of the law applicable in a dispute would not constitute a novelty in international law. For instance, in the Nicaragua case the ICJ found itself unable to decide upon infringements of multilateral treaties as the United States' declaration under Article 36(2) of the ICJ Statute expressly excluded the ICJ's jurisdiction regarding such treaties.<sup>57</sup> Therefore, the ICJ was only able to decide the case on the basis of customary international law.<sup>58</sup> The question is thus whether a similar approach could be taken by EU Member States. Would it be possible for them to exclude Community law? In fact, most Member States that have made declarations under Article 36(2) of the ICJ Statute have excluded disputes over Community law from the ICJ's jurisdiction.<sup>59</sup> The question, however, is whether such exclusion would avoid a violation of Article 292 EC. The object and purpose of Article 292 EC is to ensure that Community law is interpreted in a uniform and consistent manner. Therefore, if a court or tribunal decided a case based on another treaty, provided that treaty is not an integral part of Community law, or on customary international law, there would be no violation of Article 292 EC. However, an exception would have to be made for provisions of domestic or international law which must be interpreted in the light of Community law. If, for instance, a treaty provision refers to Community law or where domestic law, which is based on a Community directive, is at issue, Article 292 EC would be triggered. Nonetheless, the general possibility for Member States to exclude Community law from a dispute does exist. Should the Member States choose to do so, the international court or tribunal called upon to decide the case would have to respect the exclusion of Community law *proprio motu* and would therefore be banned from applying it. The reason for this is that its jurisdiction depends on the will of the parties: Only in so far as the parties have agreed to that court's or tribunal's jurisdiction can they assume jurisdiction.

However, when doing so, Member States would have to bear in mind whether such exclusion makes sense for them as the judgment or award they receive will not reflect the true legal situation between them. If the Member States then act according to that decision rendered by the international court or tribunal, they may even act contrary to Community law and thus can be held responsible under Articles 226 and 228 EC.

<sup>57</sup> The declaration can be found in: *Military and Paramilitary Activities in Nicaragua* (Nicaragua/United States of America) (Preliminary Objections) [1984] ICJ Rep. 392, 421 et seq.

<sup>58</sup> *Military and Paramilitary Activities in Nicaragua* (Nicaragua/United States of America) (Merits) [1986] ICJ Rep. 14, para. 172.

<sup>59</sup> The reservations typically exclude 'any dispute which the Parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement or which is subject to another method of peaceful settlement chosen by all the Parties' (quote from the German declaration of 1 May 2008). Only Bulgaria, Denmark, Finland, Greece and Sweden do not seem to have included a reservation to that effect.

#### §4. DUTY OF OTHER COURTS TO RESPECT THE EXCLUSIVE JURISDICTION OF THE ECJ

Having examined the exact scope of the ECJ's jurisdiction and explored the possibility of exceptions to it, a further issue arises: Are international courts and tribunals bound to respect the ECJ's exclusive jurisdiction or is that merely a matter of Community law, which is of no relevance from the point of view of public international law? Generally speaking, the jurisdiction of international courts only reaches as far as the instrument granting them jurisdiction permits. For instance, the ITLOS only has jurisdiction over the UNCLOS<sup>60</sup> and could thus maintain that Article 292 EC is of no relevance for it even though it is a mixed agreement under Community law. The same holds true for any dispute brought *ad hoc* to the ICJ or an arbitral tribunal, which will normally only consider the declaration under Article 36(2) or the arbitration agreement in order to determine its own jurisdiction. Nonetheless, the PCIJ argued in an *obiter dictum* in the *Rights of Minorities Case* that it would not have jurisdiction where the dispute falls within the exclusive jurisdiction of some other authority.<sup>61</sup> The PCIJ, however, did not give any reasons for this *dictum*. The article will therefore explore several routes which could lead to a duty for international courts to accept the exclusive jurisdiction of the ECJ.

##### A. PROHIBITION TO INTERFERE WITH OTHER COURTS

In German academic writing of recent years it has been argued that there exists an emerging doctrine in international law, which prohibits an international organization from interfering with the effectiveness of other international organizations (*Störverbot*).<sup>62</sup> According to that view, when interpreting a provision pertaining to the legal order of another organization the dispute settlement body of one organization has a duty to respect the interpretations of the dispute settlement body of the organization to which that provision pertains. It is argued that there is even a duty to ask that dispute settlement body for an opinion on the interpretation of its provisions.<sup>63</sup> In that sense, the prohibition of interference with another organization is said to be similar to the prohibition on the use of force laid down in Article 2(1) of the UN Charter.<sup>64</sup> According to this view, an international court or tribunal would have to declare a case inadmissible if that court

<sup>60</sup> See Article 279 UNCLOS, which expressly refers to disputes over 'this Convention'.

<sup>61</sup> *Rights of Minorities in Upper Silesia (Minority Schools)* PCIJ Rep, Ser. A., No. 15, 3, 23.

<sup>62</sup> J. Neumann, *Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen*, (Duncker & Humblot, 2002), 609; Neumann, 'Die materielle und prozessuale Koordination völkerrechtlicher Ordnungen', 61 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2001), 529 (559); Ruffert, 'Zuständigkeitsgrenzen internationaler Organisationen im institutionellen Rahmen der internationalen Gemeinschaft', 38 *Archiv des Völkerrechts* (2000), 129 (161).

<sup>63</sup> Neumann, *Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen*, 609.

<sup>64</sup> Neumann, 61 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2001), 560.



is faced with the exclusive jurisdiction of the ECJ, under Article 292 EC. Otherwise it would infringe the prohibition of interference.<sup>65</sup> The advocates of such a prohibition admit that it has not yet been positively phrased by the ICJ but argue that there are several decisions by international courts, which were based on that principle. They refer, for instance, to the *Legality of the Use of Nuclear Weapons* case where the ICJ rejected the World Health Organization's (WHO) request for an advisory opinion because it lacked the competence to do so.<sup>66</sup> However, in that case the ICJ expressly referred to Article 96 (2) of the UN Charter, which demands that any request for an advisory opinion made by a specialized agency, which has been authorized to make such a request by the General Assembly, must fall within the scope of its activities.<sup>67</sup> From the application of written rule such as that in Article 96 (2) UN Charter one cannot conclude that there is a rule of customary international law or even a general principle of law, which would lead to the same result.

Neither is there any evidence for the existence of such a prohibition in customary international law. In order for a rule to be part of customary international law there has to be evidence of a general state practice and an acceptance of that practice as law.<sup>68</sup> But at present, there is no evidence for either of these. Admittedly, States make efforts to coordinate their actions in international organizations in order to avoid an overlap of their activity, such as the inclusion of rules to resolve treaty conflicts in international agreements<sup>69</sup> or of rules that proscribe the cooperation of international organizations.<sup>70</sup> Also, the WTO Ministerial Conference recognized the general competence of the International Labour Organization to deal with labour standards.<sup>71</sup> Furthermore, some international organizations exchange information, e.g. the Council of Europe and the European Community.<sup>72</sup> Nonetheless, these efforts to avoid jurisdictional conflicts are not sufficient evidence for the existence of a customary rule under public international law.<sup>73</sup> It is submitted that such efforts are mainly made for practical reasons in order to avoid diplomatic complications. There is no evidence that States believe that they are under a general legal duty to avoid interferences. Therefore, an international court or tribunal called upon to decide a dispute between two Member States where Community

<sup>65</sup> Oen, 45 *Archiv des Völkerrechts* (2007), 162.

<sup>66</sup> *Legality of the Use By a State of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep. 66; Neumann, *Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen*, 400; Neumann, 61 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2001), 560.

<sup>67</sup> *Legality of the Use By a State of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep. 66.

<sup>68</sup> See V. Lowe, *International Law* (Clarendon, 2007), 36 et seq.

<sup>69</sup> See e.g. Article 103 of the UN Charter.

<sup>70</sup> See e.g. Article 278 UNCLOS.

<sup>71</sup> 36 ILM [1997] 220, 221; cf. Ruffert, 38 *Archiv des Völkerrechts* (2000), 162.

<sup>72</sup> See exchange of letters between the Council of Europe and the European Community concerning the consolidation and intensification of cooperation (OJ 1987 L 279 p. 35).

<sup>73</sup> This was argued by Ruffert, 38 *Archiv des Völkerrechts* (2000), 162.

law is (potentially) at issue is not bound by a rule which prohibits it from interfering with the jurisdiction of the ECJ.

## B. ABUSE OF RIGHTS

Another possible approach would be to regard any action before an international court or tribunal brought by one Member State against another Member State as an abuse of rights. The prohibition of abuse of rights can be regarded a general principle of international law.<sup>74</sup> The doctrine prohibits the malicious exercise of a right in order to attain an advantage while at the same time the other party is put at a disadvantage.<sup>75</sup> Considering that the act of bringing a dispute before a court is the exercise of a right usually arising from a treaty, the concept of abuse of rights is generally applicable in this respect and can be referred to as abuse of process. Clear cases of such an abuse are the instigation of proceedings in order to harass or harm the defendant or where the claim made is manifestly groundless.<sup>76</sup> There is, however, a crucial difference between proceedings before international courts and proceedings before domestic courts, for which the doctrine of abuse of process was first developed. Proceedings before a domestic court can (and will) normally be instigated against the will of the defendant. The defendant must answer the case in order to avoid a default judgment and is thus 'forced' into the proceedings. In contrast, proceedings before international courts are generally only possible where the defendant has consented to them. Where that is the case, there is generally no room for an abuse of process as the defendant has agreed to be sued. In this case the general thought behind the rule of *volenti non fit iniuria* can be applied. This would, for instance, have been the case in the Iron Rhine dispute where the Netherlands clearly agreed to the proceedings by concluding the arbitration agreement with Belgium.

However, there are growing instances where a court's or tribunal's jurisdiction is obligatory. Where the consent of the defendant Member State for the instigation of the proceedings is not necessary on a case-by-case basis, that international court or tribunal enjoys an obligatory jurisdiction. That was for instance the case in the *Mox Plant* litigation where Article 281 et seq UNCLOS proscribe that States would have to

<sup>74</sup> Kiss, 'Abuse of Rights' in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Volume I (North-Holland, 1992), 4; B. Cheng, *General Principles of Public International Law As Applied By International Courts and Tribunals*, (Grotius, 1987), 121; H. Lauterpacht, *The Function of Law in the International Community*, (Clarendon Press, 1933), 286; Case Concerning Certain German Interests in Polish Upper Silesia (Germany v Poland) (Merits) PCIJ Rep Series A No 7, 37 et seq. in which the PCIJ denied the existence of an abuse as the act in question did not overstep these limits.

<sup>75</sup> *Case Concerning Certain German Interests in Polish Upper Silesia* (Germany v Poland) (Merits) PCIJ Rep Series A No 7 p.

<sup>76</sup> Lowe, 'Overlapping Jurisdiction in International Tribunals', 20 *Australian Yearbook of International Law* (1999), 191 (202-203).

explicitly agree to exclude a judicial procedure.<sup>77</sup> Equally that would be the case where both Member States have made declarations under Article 36 (2) of the ICJ Statute and have not included a reservation regarding proceedings before the ECJ. Therefore, it can be argued that where an international court or tribunal enjoys compulsory jurisdiction, the abuse of rights doctrine is generally applicable. However, it would go too far to follow Shany's approach whereby an abuse of rights would have to be seen in every violation of an exclusive or residual jurisdiction clause<sup>78</sup> as the defendant may well have consented to the proceedings before the other tribunals as the Iron Rhine case demonstrates. In addition, for an abuse of rights to exist, the plaintiff Member State before that other court or tribunal has to act maliciously. This means that if the plaintiff merely overlooks the possibility of the ECJ's jurisdiction over the case, there is no abuse. This could arguably have been the case with Ireland in the *Mox Plant* litigation. The ECJ's jurisdiction over mixed agreements is very difficult to assess and therefore it would be hard to prove that Ireland maliciously failed to instigate proceedings before the ECJ in order to obtain an advantage and at the same time put the United Kingdom at a disadvantage. Certainly, after the clear ruling in the *Mox Plant*-Case, the ECJ's complicated case law on its own jurisdiction regarding mixed agreements can no longer serve as an excuse in that respect: As has been shown above, a Member State intending to take another Member State to court for the violation of a mixed agreement, has to consult the ECJ first. Nonetheless, it would have to be established that the plaintiff acted maliciously.

Therefore, the abuse of rights doctrine is only of limited value for the resolution of jurisdictional conflicts as a court will only be able to dismiss its jurisdiction on that basis where the defendant has not agreed to the proceedings and where the plaintiff has acted maliciously.

### C. ARTICLE 292 EC AS *LEX SPECIALIS*

Yet another possibility would be to view Article 292 EC as *lex specialis* to other provisions providing for the jurisdiction of another court or tribunal besides the ECJ. The *lex specialis* principle is widely recognized as a general principle of international law and applicable for the solution of treaty conflicts.<sup>79</sup> The principle says that the more specific rule prevails over the general rule. Conflicts of jurisdiction between international courts

<sup>77</sup> This was for instance held to have been the case with regard to Article 16 of the Convention for the Conservation of Southern Bluefin Tuna in an arbitral award rendered by a tribunal constituted under the UNCLOS, 53 R.I.A.A. p. 1.

<sup>78</sup> Shany, *The Competing Jurisdiction of International Courts and Tribunals*, 258.

<sup>79</sup> Cheng, *General Principles of Public International Law As Applied By International Courts and Tribunals*, 25–26; Lowe, 20 *Australian Yearbook of International Law* (1999), 195; D. P. O'Connell, *International Law* (2nd ed., Stevens, 1970), 13; the ILC also points to the wide acceptance of the *lex specialis* doctrine in its 2004 report, UN. Doc.A/59/10, para. 305; from the case law cf. e.g. *Gabcikovo-Nagyamaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, para 132; *Mavromattis Palestine Concessions (Greece v UK) (Jurisdiction)* [1924] PCIJ Rep Series A, No 9, 30.

and tribunals are treaty conflicts because that jurisdiction depends on the consent of States, which is usually given by way of a treaty. Therefore, where there are two or more international courts or tribunals which potentially have jurisdiction over a dispute, this jurisdictional conflict is at the same time a treaty conflict.<sup>80</sup> The rationale behind the application of *lex specialis* as a rule for resolving treaty conflicts is that it reflects more closely the consent of the states in question.<sup>81</sup> Therefore, Lowe is right in arguing that the principle of *lex specialis* can also be applied in cases of jurisdictional conflicts as it is a reflection of the parties' will.<sup>82</sup> The application of *lex specialis* is thus consistent with the requirement of consent as the basis for jurisdiction. As a consequence, a court or tribunal, before which proceedings between two Member States about Community law have been instigated on the basis of a general jurisdictional provision, such as Article 36 of the ICJ Statute, is forced not to accept the case.<sup>83</sup>

However, this approach only helps to solve cases where Article 292 EC is clearly the special provision. The *Mox Plant* dispute, however, shows that the application of the *lex specialis* principle is often difficult or even impossible as the ECJ was not the 'natural' forum for disputes concerning the UNCLOS or the OSPAR Convention. The only reason the ECJ had jurisdiction to interpret these treaties is because they are integral parts of Community law. Therefore, an argument could be made that the treaty provisions in the UNCLOS conferring jurisdiction over disputes about the UNCLOS on the dispute settlement bodies mentioned there, are special to Article 292 EC. On the other hand, Article 292 EC would have been special with regard to the parties: Only 27 of the parties to UNCLOS are also parties to the EC Treaty. Therefore, *lex specialis* would not have been of much help in the resolution of the *Mox Plant* dispute.

Furthermore, Article 292 EC can never be regarded as *lex specialis* where the parties to the dispute have agreed upon an *ad hoc* arbitration agreement to bring the dispute before an arbitral tribunal. This agreement would be more special than Article 292 EC for two reasons: The first is that it was agreed for the very dispute before the arbitral tribunal whereas Article 292 EC is applicable for all disputes over Community law; the second reason is that Article 292 EC is binding on 27 Member States whereas the arbitration agreement would only be binding on two Member States, making it more special with regard to the parties involved. Therefore, in the *Iron Rhine* case, *lex specialis* was not applicable.

In conclusion, only in very clear cases can *lex specialis* help to align the legal situation under Community law with the situation under international law.

<sup>80</sup> On the definition of what constitutes a treaty conflict see Vranes 'The Definition of 'Norm Conflict' in International Law and Legal Theory' 17 *European Journal of International Law* (2006), 395; J. Pauwelyn, *Conflict of Norms in Public International Law*, (CUP, 2003), 164.

<sup>81</sup> Pauwelyn, *Conflict of Norms in Public International Law*, 387.

<sup>82</sup> Lowe, 20 *Australian Yearbook of International Law* (1999), 195.

<sup>83</sup> Ibid.

#### D. LACKING COMPETENCE TO BRING CASE BEFORE ANOTHER COURT

Another argument for an international court to deny its own jurisdiction could be that Member States of the European Community simply lack the competence under international law to bring such a dispute before another court than the ECJ. By joining the Community and thus agreeing to the inclusion of Article 292 EC, one could argue, they have transferred that competence on the Community and can no longer exercise it themselves. As a consequence, an arbitral tribunal that has been formed by an agreement between two or more Member States would have to regard that agreement as void. The same holds true for any other agreement between Member States, e.g. according to Article 36 of the ICJ Statute.<sup>84</sup>

Nonetheless, there seem to be good reasons to assume why under public international law this conclusion is flawed. By joining the Community, the Member States have not lost their capacity as sovereign States. They still enjoy their 'capacity to enter into relations with the other states' as formulated in Article 1 of the 1933 Montevideo Convention as one of the conditions for statehood.<sup>85</sup> Only if the Member States had become part of a European federation would they have lost that capacity. The Community, however, has not attained statehood as it is still lacking the necessary *Kompetenz-Kompetenz* (or *compétence de la compétence*). This becomes evident from Article 5 EC, which postulates that the Community 'shall act within the powers conferred upon it'.<sup>86</sup> This means that, in contrast to a federation, the Community cannot extend its own powers beyond what has been expressly or impliedly been conferred on the Community by its Member States.<sup>87</sup> Despite their membership in the Community, Member States are thus still capable of entering into relations with other States or with international organizations under international law. Therefore, a treaty concluded by a Member State is generally valid under international law even if it violates rules of Community law.<sup>88</sup>

This result is confirmed by Articles 27 and 46 VCLT. These articles ban a party to a treaty from invoking provisions of domestic law for the justification of the violation of that treaty. Otherwise treaty-making would be highly insecure as third parties could never fully rely on the validity of treaties.<sup>89</sup>

<sup>84</sup> Such was indeed the argument by H. J. Wefelmeier, *Der internationale und der europäische Gerichtshof*, (PhD Thesis, Cologne 1968), 191.

<sup>85</sup> Montevideo Convention on the Rights and Duties of States (Montevideo, 26 December 1933).

<sup>86</sup> See Opinion 1/03, Lugano Convention [2006] ECR I-1145, para. 124; D. Chalmers, A. Tomkins, *European Union Public Law* (CUP, 2007), 211.

<sup>87</sup> Admittedly, Article 308 EC gives the Community an opportunity to extend its powers considerably, cf. Chalmers; Tomkins, *European Union Public Law*, 213. Nonetheless, as was demonstrated by the ECJ in its opinion concerning accession to the ECHR, there are limits as Art. 308 EC is also based on the principle of conferred powers. See Opinion 2/94 [1996] ECR I-1759, paras. 27–35.

<sup>88</sup> The same must be true for unilateral acts by a Member State.

<sup>89</sup> I. Brownlie, *Principles of Public International Law*, (6th ed., OUP, 2003), 587.

Community law shares many similarities with domestic law. It is (partly) directly applicable in the internal legal orders of the Member States and enjoys primacy over domestic law. In addition, the division of competences between Member States and the Community is rather complex and cannot easily be understood by an outsider so that a third State would deserve to be protected. Therefore, the idea behind Articles 27 and 46 VCLT can be applied to Community law.<sup>90</sup> Article 292 EC only limits the Member States' sovereignty under Community law but not under international law. The restraints placed upon Member States under Community law therefore do not percolate through to international law. Also, the exception to Article 46 VCLT cannot be applied here either. According to that exception a State can rely on provisions of its internal law regarding the competence to conclude treaties where the 'violation was manifest and concerned a rule of its internal law of fundamental importance'. Even if one were to argue that Article 292 EC is a rule of fundamental importance to Community law, one would still have to establish that the violation was manifest. According to Article 46 (2) VCLT a 'violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith'. The distribution of external competences between the Member States and the Community, however, is so complicated, even for insiders, that in most cases it is anything but evident.<sup>91</sup> This is even more so for outsiders, such as an international court or tribunal trying to establish whether it has jurisdiction or not. Therefore, the exception to Article 46 VCLT cannot be applied here. Thus it seems that from an international law point of view, Member States can still bind themselves in all fields of international even if according to Community law they have lost their competence to do so.

However, one must not forget that Member States, which bring a case concerning the interpretation of Community law before another court or tribunal than the ECJ, violate Article 292 EC and are therefore in breach of the EC Treaty. This means that the EC Commission can instigate proceedings before the ECJ against these Member States under Article 226 EC.<sup>92</sup> Should the ECJ find that the Member States have violated the EC Treaty, they will be obliged under Article 228 EC to take the necessary measures to comply with the judgment of the ECJ. According to the ECJ's jurisprudence this means that 'the

<sup>90</sup> Klabbers, 'Restraints on the Treaty-Making Powers of Member States Deriving From EU Law: Towards a Framework for Analysis', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations*, (Kluwer, 2002) 151, 173; J. Klabbers, *Treaty Conflict and the European Union*, (CUP, 2009), 212. A similar point is made by de Witte 'Old-fashioned Flexibility: International Agreements between Member States of the European Union', in G. de Búrca, J. Scott (eds.), *Constitutional Change in the EU*, (Hart, 2000), 31, 48 and by Peters, 'The Position of International Law within the European Legal Order', 40 *German Yearbook of International Law* (1997), 9, 38.

<sup>91</sup> Klabbers, *The European Union as an Actor*, 173.

<sup>92</sup> The Commission also has the possibility to seek interim measures to be prescribed by the ECJ under Article 243 EC, e.g. where it realizes that a Member State has just brought proceedings before another court and thereby violated the EC Treaty. Such measures could prevent the Member State from pursuing its claim further until the ECJ has decided whether the proceedings were brought in violation of Art. 292 EC.

process of compliance must be initiated at once and completed as soon as possible'.<sup>93</sup> In the first place, the Member States will have to refrain from applying the judgment of the other court or tribunal. Should they already have followed the judgment, they might be obliged to revoke any measures taken, which are contrary to Community law.<sup>94</sup> From a Community perspective the judgment must be regarded as being null and void. For the Member States the legal situation is thus clear: They are obliged to follow the ECJ's view as they have accepted that the ECJ is the only court which may authoritatively interpret the EC Treaty.

The question is whether for that reason any other court or tribunal would have to respect the ECJ's exclusive competence and therefore would have to declare the case inadmissible if Community law is at issue.

In order to be able to answer this question, it is necessary to recall why it is that from the point of view of international law the division of competences within the Community is generally of no relevance. The main reason for this is that third parties, which have no knowledge of a State's domestic legal restraints, must be protected. They may *bona fide* rely on another State's promises and need not fear that the promise is invalid because of reasons, which have their origin outside the sphere of international law.

However, this rationale does not apply where only Member States are parties to the other treaty. In a dispute between Member States, all parties to the dispute are bound by Article 292 EC. Thus Article 292 EC reflects the true legal situation between those states as regards the jurisdiction of a court or tribunal. Therefore, the Member States do not have any reasonable interest worthy of being protected in having their case heard by another court or tribunal than the ECJ. Therefore, the plaintiff Member State does not deserve to be protected by the law. In addition to that, the other court or tribunal is unable to render a decision that is truly binding on the Member States involved as such a decision must not be followed under Community law. For this reason, that court or tribunal should be forced to decline to hear the case.<sup>95</sup> In the *Mox Plant*-Case, the arbitral tribunal seems to have gone down a similar route in that it suspended proceedings until a decision about the ECJ's jurisdiction had been made.<sup>96</sup> However, the legal basis for the arbitral tribunal's suspension remained unclear. It seems to be mainly based on 'mutual respect and comity' rather than on the explicit exception laid down in Article 282 UNCLOS or even the solution argued for in this paper.<sup>97</sup> Nonetheless, that decision shows that

<sup>93</sup> Case C-387/97 *Commission v Greece* [2000] ECR I-5047, para 82.

<sup>94</sup> Where Member States do not comply with the ECJ's Art. 226 judgment, the Commission can bring further proceedings under Art. 228 (2) EC, under which the ECJ may impose a penalty payment on the Member State(s).

<sup>95</sup> Lavranos, 2 *European Constitutional Law Review* (2006), 467. He argues that the decision would be rendered superfluous; the same argument is made in: Lavranos, 5 *Law and Practice of International Courts and Tribunals* (2006), 491; Lavranos, 32 *European Law Review* (2007), 92.

<sup>96</sup> Arbitral Tribunal, Order No. 3 of 24 June 2003; [www.pca-cpa.org/upload/files/MOX%20Order%20no3.pdf](http://www.pca-cpa.org/upload/files/MOX%20Order%20no3.pdf) [13 July 2009].

<sup>97</sup> *Ibid* at para. 28.

international courts and tribunals are aware of the ECJ's exclusive jurisdiction and its implications for the Member States.

## §5. CONCLUSIONS

The article has tried to demonstrate that the jurisdiction of the ECJ is far-reaching and covers all areas of Community law, effectively banning other international courts and tribunals from interpreting it. Considering that according to the ECJ's case law, international agreements are an integral part of Community law there is ample potential for jurisdictional conflicts between the ECJ and other courts, which have also been granted jurisdiction over the treaty in question. When it comes to mixed agreements, the ECJ has jurisdiction over all provisions for which there was an exclusive or shared Community competence. Only provisions that fall into the exclusive jurisdiction of the Member States are outside the Court's jurisdiction. The only forum competent to decide about these questions is the ECJ. The consequence for Member States is that they would have to present any dispute in which Community law is potentially relevant first to the ECJ. Only if the ECJ declines to decide the case or parts of it can Member States safely bring the case before another court or tribunal. There are no exceptions to this exclusivity. Even in cases where the interpretation of Community law is evident or where the ECJ itself has already interpreted the provision in question, Member States must refer the dispute to the ECJ. The only way of avoiding a decision by the ECJ would be to exclude any application of Community law from the dispute. The ECJ's exclusive jurisdiction must be respected by other courts or tribunals as their decisions would not have any effect in the Community legal order and thus for the parties to the dispute. Such a court or tribunal would therefore have to dismiss the case in favour of the ECJ.

This rather rigorous approach gives rise to the question whether the ECJ's strictly exclusive jurisdiction is desirable. From the point of view of public international law one could argue that at least in cases where a Community agreement provides for the establishment of a permanent court such as the ITLOS, it would make more sense if all cases arising under that agreement were interpreted by that court only. This would not only lead to a consistent and reliable case law but also acknowledge that that court is a specialist forum. Moreover, the ECJ is not a specialist court for cases arising under international law. There is thus a danger that the ECJ will approach the interpretation of a Community agreement in the same manner as the interpretation of the EC Treaty and not in the way an international court would. This can lead to different interpretations of the same provisions by the ECJ and by the Court established by the agreement. Yet we must not forget that the exclusivity of the ECJ's jurisdiction is limited to cases between Member States. Even if the ECJ interpreted the agreement with a certain Community law bias it would only affect the parties to the very dispute, all of which are Member States of the Community. As the case law of the ECJ would not bind any other court



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subsequently interpreting the same provisions, the dangers for legal certainty are rather low.<sup>98</sup> In addition, disputes between Member States will hardly ever be isolated from core Community law such as the EC Treaty or secondary legislation, over which the ECJ would undoubtedly have exclusive jurisdiction. Therefore there are good reasons for supporting the ECJ's rigorous approach regarding Article 292 EC.

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<sup>98</sup> As regards the UNCLOS this is an already built-in feature: Article 287 UNCLOS provides for various possible fora for the decision of disputes over the interpretation of the UNCLOS.